

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	BOARD DECISION
)	
PUBLIC UTILITIES)	
COMMISSION)	
)	PSC NO. 97-04
From the Executive Officer's disapproval of)	
the Agreements between the Public Utilities)	
Commission and Path Ways Personnel, Inc.)	December 2, 1997
_____)	

APPEARANCES: Harry Gibbons, Attorney, on behalf of California State Employees Association. Diana L. Lee, Staff Attorney, on behalf of the Public Utilities Commission.

BEFORE: Lorrie Ward, President; Floss Bos, Vice President; and Richard Carpenter, Member

DECISION

Pursuant to Government Code § 19132, the California State Employees Association ("CSEA") requested that the State Personnel Board (the "Board") review two agreements, Contract No. PS-1605 ("PS-1605") and Contract No. PS-1729 ("PS-1729"); PS-1605 and PS-1729 are sometimes collectively referred to hereafter as the "Agreements") that had been entered into between the Public Utilities Commission (the "PUC") and Path Ways Personnel, Inc. ("Path Ways") to determine whether the Agreements were permissible under any exceptions listed in Government Code § 19130(b).

In accordance with Public Contract Code § 10337(c), the review of the Agreement was delegated to the Executive Officer of the Board. By letter dated August 4, 1997, the Executive Officer set forth his disapproval of the Agreements, finding that they did not

meet the requirements of either Government Code section 19130(b)(8) or Government Code § 19130(b)(10).

The PUC has appealed the Executive Officer's decision to the Board.

In this decision, the Board concurs with the Executive Officer's disapproval of the Agreements as not being justified under either Government Code section 19130(b)(8) or Government Code § 19130(b)(10).

BACKGROUND

Prior to January 1, 1995, the PUC regulated: (1) the rates, routes and services of motor carriers and (2) the licensing, insurance and safety requirements for motor carriers (hereafter, "licensing" or "licensing work"). Effective January 1, 1995, federal legislation prohibited the PUC from regulating the rates of motor carriers and collecting user fees in conjunction therewith. (The federal law did not pre-empt the PUC's licensing work.)

As a result of this loss of regulatory authority and user-fee income, the PUC prepared for layoffs. According to the PUC, the uncertainty created by the potential layoffs motivated approximately 100 employees to leave the PUC for other jobs, including many clerical employees who performed licensing work functions that the PUC still retained.

To permit the PUC to fill 66 vacant positions in light of its loss of user-fee income, the Legislature allowed the PUC to move funds authorized for Personal Services expenditures to Operating Expenses to hire temporary employees to meet its licensing requirements.

According to the PUC, even with the additional money budgeted for temporary services, the PUC was unable to fill all its vacant positions with civil service employees

through the various methods it utilized: contacting people on the reemployment list as well as retired annuitants, and entering into an interagency agreement with University Services. In order to fill the remaining vacant positions, the PUC entered into PS-1605 with Path Ways for the original term of September 1, 1995 through June 30, 1996. PS-1605 was thereafter amended four times to extend to March 30, 1997. While PS-1605 was in effect, the PUC hired temporary employees through Path Ways to perform the licensing work.

Effective October 1, 1996, the Legislature passed AB 1683 which transfers the PUC's licensing functions for motor carriers (except for used household goods) to the Department of Motor Vehicles ("DMV") and the California Highway Patrol ("CHP"). This transfer will occur on January 1, 1998. According to the PUC, this pending transfer of functions to DMV and CHP further complicates the PUC's ability to hire civil service staff to perform licensing work since the PUC is, again, in a down-sizing mode and expects to lose approximately 60 positions as a result of the transfer of functions.

In April 1997, the PUC and Path Ways entered into PS-1729, which expires on December 31, 1997.

DISCUSSION

The PUC contends that the Agreements are justified under Government Code §§ 19130(b)(8) and (b)(10). The Boards disagrees with these PUC contentions.

THE AGREEMENTS ARE NOT JUSTIFIED UNDER GOVERNMENT CODE § 19130(b)(8).

Government Code § 19130(b)(8) permits state agencies to enter into personal services contracts when:

The contractor will provide equipment, materials, facilities, or support services that could not feasibly be provided by the state in the location where the services are to be performed.¹

The PUC did not make an adequate effort to fill vacancies with civil service employees. The PUC claims it tried to fill as many vacancies as it could with civil service employees by: (a) trying to convince former staff listed on the re-employment list to return to the PUC; (2) contacting the Association of California State Retirees to obtain employee annuitants with the required skill level and (3) developing an interagency agreement with University Services to staff some positions. While the PUC filled some of the vacancies with former employees hired from the re-employment list and through the interagency agreement with University Services, it could not fill all the vacancies this way. It filled no vacancies with annuitants.

The PUC claims that, since the re-employment list in this matter was never cleared, the PUC could not use the SROA or open-eligible lists to hire civil service employees.

The Board does not find convincing the PUC's claims that it made adequate efforts to hire civil service personnel before it resorted to outside contracts. The PUC has not provided any reasonable explanation as to why the re-employment list could not have been cleared or the other employment lists could not have been used.

¹ The Board accepts for the sake of argument, without deciding, the PUC's contention that clerical employees are "support services" as that term is used in Government Code § 19130(b)(8).

In addition, the PUC has not explained why it could not have created limited-term appointments in accordance with Government Code § 19180.3² to fill the vacant positions as CSEA argues. At the hearing before the Board, the PUC claimed that since limited-term employees can quit at any time to take permanent positions, it would be too expensive and time-consuming for the PUC to hire and train new limited-term employees each time existing limited-term employees left to take permanent positions.

While cost savings are a justification for entering into a personnel services contract under Government Code § 19130(a), the PUC did not follow the procedures established by Government Code § 19131, Public Contract Code section 10337(b) and the Board's regulations to obtain Board approval for the Agreements as cost-savings contracts under Government Code § 19130(a).

In addition, the PUC presented no evidence to substantiate its assumption that it would be more time-consuming to hire limited-term employees than to contract with Path Ways.

The PUC made no showing that civil service clerical employees are not available in San Francisco. The PUC contends that since the vacancies that it needs to fill are in San Francisco where the cost of living is much higher and the available pool of civil service staff much smaller, it is much more difficult to staff the vacant positions with civil service staff in San Francisco than it would be in Sacramento. However, the PUC has

² Government Code §19080.3 provides:

Limited term appointments shall be made only for temporary staffing needs and shall not individually or consecutively exceed one year, provided that the board may authorize limited term appointments of up to a total of two years' duration when a permanent appointment would be likely to cause a layoff, demotion, or mandatory transfer requiring a change of residence upon the conclusion of the temporary staffing need. Limited term appointments may be extended within the time limits prescribed by this section without making an additional appointment.

provided no evidence to support this contention. According to CSEA, although it is conceivable that in some isolated areas of the state the clerical eligibility list might yield insufficient limited term employees to meet a pressing need, it is unlikely that San Francisco would qualify as such an area. The Board finds that CSEA's arguments on this issue have greater merit.

The PUC has not shown that Path Ways provides support services that cannot feasibly be provided in San Francisco as required by Government Code section 19130(b)(8).

THE AGREEMENTS ARE NOT JUSTIFIED UNDER GOVERNMENT CODE § 19130(b)(10).

Government Code § 19130(b)(10) allows a state agency to retain an outside contractor when:

The services are of such an urgent, temporary or occasional nature that the delay incumbent in their implementation under civil service would frustrate their very purpose.

In the documents CSEA has submitted and in its arguments before the Board, CSEA has assumed for the sake of argument that the clerical services obtained through the Agreements are both urgent and temporary but contends that the PUC has failed to show that "the delay incumbent in their implementation under the civil service would [have] frustrate[d] their very purpose." According to CSEA, had the PUC hired limited term employees, there would have been no delay and the services would have been promptly implemented.

In addition, CSEA contends that even if the work was so urgent in 1995 that even a short delay incumbent in hiring limited term employees was too great, the PUC has

failed to explain why, after hiring Path Ways' employees in 1995, the PUC was unable to hire limited term civil servants during 1996 and 1997.

The Board finds that CSEA's contentions have merit. The PUC has provided no evidence to explain why, even if it did not have the time to hire clerical employees to fulfill its statutory time deadlines in 1995, there was not sufficient time to hire limited term employees in 1996 and 1997. The PUC has not shown that the services provided by Path Ways are of such an urgent, temporary or occasional nature that if the PUC had attempted to perform them with civil service staff, the delay in doing so would have frustrated their very purpose as required by Government Code § 19130(b)(10).

CONCLUSION

For the foregoing reasons, the Board disapproves the Agreements.

STATE PERSONNEL BOARD

Lorrie Ward, President
Floss Bos, Vice President
Richard Carpenter, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision at its meeting on December 2, 1997.

Walter Vaughn
Acting Executive Officer
State Personnel Board